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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 73, Original

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF NEVADA,
Defendant.

REPLY BRIEF OF PLAINTIFF STATE OF CALIFORNIA

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INTRODUCTION

The boundary between California and Nevada was fixed by California's Constitution of 1849, never to be changed without the consent of that state. From Oregon to Lake Tahoe it was set on the 120th meridian west of Greenwich; a line meant to be "as near as practicable to the eastern base of the Sierra Nevada." Browne, Report of the Debates in the Convention of California of September-October, 1849 (Arno Press ed. 1973) p. 427. From its intersection with the 39th parallel in Lake Tahoe, it runs in a straight line southeasterly to a point in the Colorado River where it intersects the 35th parallel. Cal. Const. of 1849, art. XII, ex. 5. This Court is asked

to decide which of several surveys purporting to show that boundary should be confirmed or, should all proposed lines prove unacceptable, to order a new survey.

In his report, the Special Master reviewed a half-century of efforts to establish the boundary between California and Nevada. Following Justice Holmes' observation that a page of history is worth a volume of logic, he concluded that the lines respected and observed by both states for periods of 108 years (in the north) and 80 years (in the south) should be confirmed by this Court as marking California's eastern boundary.

In her exceptions, Nevada necessarily trod a narrow and perilous path. For she was compelled to make two distinct and inconsistent arguments in her contentions with respect to the boundary north of Lake Tahoe (referred to variously as the "northern" or "meridional" boundary) and that portion from Lake Tahoe to the Colorado River (the "oblique" boundary).

Nevada's Contentions Respecting the Northern Boundary

In order to satisfy her historical but long quiescent desire for a strip of Eastern California on the northern boundary (e.g., exs. 28–32, 34, 37), it was necessary for her to resurrect a survey undertaken by the states in 1863 but abandoned by them when the federally-financed Von Schmidt Survey of 1872–1873 was completed. The 1863 line should be revived, Nevada contends, regardless of its obsolescence and the fact that subsequent surveys found it to be much more inaccurate than even the line presently observed. Exs. 64, 161, 239,

DDDD. The reason: State's rights. The federally-financed Von Schmidt Survey replaced the 1863 survey undertaken by the two states. It was, therefore, an officious and unconstitutional interference with state sovereignty. Since the federal government had no constitutional power to survey interstate boundaries, its acts in contracting for the Von Schmidt Survey were void. The survey was consequently tainted and could not have the effect of marking state boundaries.

What of the undisputed facts showing that Nevada not only accepted but welcomed the survey? E.g., exs. 114, 136, 137. Immaterial, answers Nevada, because a state may not assent to an unconstitutional act.

What of the 108 years following in which both states observed the 1873 line? The doctrines of prescription and acquiescence have no effect, she replies, because California's assertion of jurisdiction was not based on a claim of right.

In short, Nevada's contentions for resurrection of an 1863 line on the northern segment of her western boundary require adoption of the premises that:

1. A federally-financed survey of an interstate boundary is invalid and may not be accepted and observed by the states affected; and

2. The states may not acquiesce in a line which was delineated by a government lacking the constitutional power to do so.

These assumptions require the rejection of the well-established body of law this court has set forth on the subject of acquiescence and the adoption of a new and

novel theory which could deprive the United States of much of its power to survey the public lands.

Nevada's Claims with Respect to the Oblique Boundary

With respect to the oblique boundary, however, this argument would not do. This is because the state surveyors of 1863 only ran their line some 103 miles south of Lake Tahoe before they abandoned their work. Exs. 91, 99, DDDD. There is, therefore, no state-conducted survey of the oblique boundary to revive, regardless of Nevada's protestations that, adding an additional 73 miles subsequently run, a survey was completed "to within a few miles" of what was then the termination of Nevada's boundary at the 37th parallel. Nevada's Exceptions and Brief 26.[1] To create an oblique boundary more to her liking, therefore, Nevada urges an imaginative variety of solutions. First, she suggests, continue where Messrs. Houghton and Ives left off in 1863 and extend their survey to the Colorado River. If this will not do, restore Von Schmidt's survey of the oblique boundary conducted in 1874 (even though it was conducted under federal auspices and therefore is, under Nevada's first theory, invalid.)

Lastly, Nevada renews her contention that when it

[1] Little evidentiary support exists for defendant's assertion that the additional 73-mile survey performed by James Lawson was made on behalf of *both* states. It appears, on the contrary, that Lawson acted solely on behalf of Nevada, exs. 64, pp 270, 274; and that California never authorized participation in the Nevada-sponsored survey. Nevada's Responses to California's Second Request for Admissions 24(a)–(d). Furthermore, neither state statutorily adopted Lawson's survey, as they had the previous work of Houghton-Ives. Ibid.

admitted her to statehood, Congress intentionally changed California's eastern boundary from the 120th meridian west of Greenwich to the 43rd meridian west of Washington, thus giving away nearly three miles of that state to Nevada, notwithstanding the evidence showing that the two lines were believed to be congruent, and the clear constitutional obstacles in the way of such a grant. See plaintiff's brief, pp. 42–46.

SUMMARY OF ARGUMENT

The boundary between California and Nevada, described in California's Constitution of 1849, was the subject of five surveys in the nineteenth century. The last two of those surveys established that boundary from Lake Tahoe to Oregon in 1872 and from Lake Tahoe to the Colorado River in 1899.

These surveys were financed in the first case and conducted in the second by the federal government as part of its power and duty to survey and define the boundaries of the public lands. They were accepted by both states immediately, and have been observed by them in the performance of governmental functions ever since. In the face of these undisputed facts, the Special Master has properly recommended that they be confirmed as marking the established boundaries between the states.

At the time of their initial establishment, either state could conceivably have challenged their validity, and contended that the federal government acted ultra vires in surveying an interstate boundary. It is too late to raise these contentions now. The northern "meridional" line

established by Allexey Von Schmidt in 1873 was welcomed by both states, marked on the ground, and observed ever since—except to the extent the federal government was slow in closing its public land surveys on it and permitted Nevada to select additional lands within California in what appears to have been more a spirit of opportunism than a claim of right. See Nevada's Surveyor General's Report of 1911, ex. 232.

Whether laches, acquiescence, or informal acceptance is the controlling doctrine, 108 years of acceptance in the north, and 77 years in the south are periods long enough to establish a boundary that should be confirmed by this Court once and for all.

If this Court should find, for one reason or another, that the existing lines should not be adopted, then a new survey can readily fix the location of the boundary set forth in California's 1849 Constitution and never changed since then.

ARGUMENT

I

THE VON SCHMIDT AND COAST AND GEODETIC SURVEY LINES RECOMMENDED BY THE SPECIAL MASTER WERE LAWFULLY SURVEYED, IMMEDIATELY ACCEPTED, AND HAVE BEEN OBSERVED BY BOTH STATES SINCE THEIR INCEPTION

The federal government is omnipresent in the early boundary surveys of the western states and territories. It was continuously called upon to survey the boundaries

of the newly-acquired territories of the west and delineate the public lands within them. See Van Zandt, Boundaries of the United States and the Several States 109, 118, 134 (Geological Survey Prof. Paper 909, U.S.G.P.O. 1976). No matter what our views of enveloping federal power may be, there was no other entity capable of performing these functions—so necessary to the identification of public lands and their eventual disposition or reservation.

Nevada suggests that because the federal surveys conducted here were made of boundaries between two states already admitted, they were ultra vires and unconstitutional, and therefore the states were incapable of consenting to them. These contentions are, as the Special Master suggests, novel ones, and are unsupported by authority.

A. The United States is Authorized to Survey the Public Lands and in So Doing, May Survey Interstate Boundaries

Assuming that the public lands remain in federal ownership when a state is admitted into the union (cf. *Pollard's Lessee* v. *Hagan* (1845) 44 U.S. (3 How.) 212, 228–229), the federal government has a duty to survey and define their limits both for purposes of administration and disposition. *United States* v. *State Investment Company* (1924) 264 U.S. 206; *Lane* v. *Darlington* (1918) 294 U.S. 331. School lands, internal improvement lands, and other public lands transferred to the states (e.g., Taylor, El Dorado or Adventures in the Path of Empire 156 (Rio Grande ed. 1967), all necessarily had to be located within the boundaries of the state to which they were

to be transferred. E.g., *Poole* v. *Fleeger* (1837) 36 U.S. (11 Pet.) 185; *Coffee* v. *Groover* (1887) 123 U.S. 1.

The present confused and sorry state of titles on the California-Nevada boundary demonstrates the need for greater, rather than less, diligence on the part of the United States in carrying out these responsibilities. E.g., exs. 210–234; Plaintiff's Brief in Support of Special Master's Report 51–60.

The record clearly shows that California, Nevada, and the United States all realized there was uncertainty as to the location of the 120th meridian after the Daniel Major Survey of 1868 and in the location of the "oblique" line after the work of Grunsky and Minto in 1890. Report of Special Master, pp. 21–22, 28; Plaintiff's Brief in Support of Special Master's Report, pp. 16, 39–42; Plaintiff's Opening Brief, pp. 40–52, 58–62), and both California and Nevada welcomed the participation of the United States in resolving this uncertainty. E.g., Plaintiff's Brief in Support of Special Master's Report,

In authorizing these surveys, Congress was neither attempting to form a new state out of the jurisdiction of either state nor attempting to take from either state to give to the other. The surveys were not intended to revise the states' constitutional boundaries but to make certain the location of these heretofore uncertain lines.

B. The States May Accept Any Objectively Ascertainable Line to Delineate Their Interstate Boundary. Whether Such a Line Was Surveyed by Federal Contract or Under State or Private Auspices is Immaterial

Whether the United States acted beyond its express or implied powers in surveying the interstate boundary between California and Nevada, the line thus estab-

lished was promptly accepted and observed by both states. It is conceivable that the two states might have arisen in a spirit of outraged sovereignty and rejected the federal surveys of 1872–1873 and 1893–1899. The fact is that they did not. See *Indiana* v. *Kentucky* (1890) 136 U.S. 479, 509. Instead, they observed them in their taxing and regulatory activities, in police and fire-fighting functions, in educational programs, and in all other governmental programs. E.g., exhibits, responses, and admissions cited in Plaintiff's Brief in Support of Special Master's Report 28–36. Whether these actions were prompted by parsimony or by practical recognition that, as public land states, they had better have boundaries acceptable to the General Land Office for purposes of state selections, the two states welcomed these lines, and have observed them up until the present time.

C. Contrary to Defendant's Assertion, it is Clear That California's Possession of Territory to the Von Schmidt Line North of Lake Tahoe and the United States Coast and Geodetic Survey Line Along the "Oblique" Boundary is Based On a Claim of Right and Color of Title to the Extent These Are Prerequisite to Establishment of an Acquiesced or Agreed on Boundary

Because the location of their interstate boundaries were uncertain, both states welcomed the participation of the United States in correcting and clarifying them, and accepted the completed surveys as settling the question. Exs. 114, 135–136, 138, 155–157, 164.

The fact that the federal government through the General Land Office and later the Bureau of Land Management has accepted these surveys as the interstate boundaries for purposes of closing the public land surveys (exs. 110–113, 134) provides added support for the

legitimacy of these lines.

Moreover, rightful occupation of both states up to these lines can be presumed from the failure of Nevada to object thereto and to its use of and reliance on them from the time of their completion to the present. See Plaintiffs' Opening Brief, pp. 27–33, 55–58. Indeed, defendant's admissions that the presently posted and marked boundary lines between the states are the Von Schmidt Line north of Lake Tahoe and the United States Coast and Geodetic Suvey Line along the "oblique" boundary and that its state and local governments have consistently observed these lines in the conduct of their duties is conclusive of a rightful claim and color of title by the State of California.

II

NEVADA'S WESTERN BOUNDARY IS BY ITS OWN TERMS COTERMINUS WITH CALIFORNIA'S EASTERN BOUNDARY. CONGRESS HAD NO POWER TO CHANGE CALIFORNIA'S BOUNDARY WITHOUT HER CONSENT, AND HAD NO INTENTION OF DOING SO

The Special Master found correctly that the reference to the 43rd meridian west of Washington in Nevada's Constitution of 1864 was intended by Congress to be congruent with the 120th meridian west of Greenwich referred to in California's Constitution of 1849.

In fact, it appears that the 43rd meridian west of Washington was not the same as the 120th meridian west of Greenwich but some 2.5 to 2.7 miles west of the 120th meridian. Exs. 42, PPPP. However, statutes should be

construed in harmony with the Constitution, and the Act and Proclamation of Nevada's admission can be so harmonized. The description of Nevada's constitutional boundary itself exhibits the understanding that the 43rd meridian west was one and the same as the eastern boundary of California. Nev. Const., art. XIV, sec. 1, ex. 19. The maps commonly in use showed the two meridians as identical. E.g., exs. 42, PPPP, 191–192. Nevada's previous territorial boundaries reflected at once her desire for this land and Congress' recognition that it could not be granted to her without California's consent. Act of Mar. 2, 1861, ch. 83, 12 Stat. 209, ex. 14, and Nevada's first state governor regretfully acknowledged that her boundary was "defined . . . on the west by the eastern boundary of that State." First Ann. Message of H.G. Blasdel, Governor, State of Nev., ex. 32.

Congress was presumably cognizant of its lack of constitutional authority to change the boundary of a state without its consent. *Louisiana* v. *Mississippi* (1905) 202 U.S. 1; ex. 42. So even assuming that Nevada's eastern boundary was set with the intent of giving her a nearly three-mile wide strip of California, such an effort must necessarily fail, because California never consented to such a cession. See ex. 32.

CONCLUSION

California's 1849 Constitution set forth her eastern boundary in clear and objective terms, capable of ascertainment by survey. Establishing the boundaries of a new state from the vast expanses of Alta California was not easy. But when the constitutional boundary was adopted in California's constitutional convention of 1849, "[M]ost of the members were better satisfied than they had anticipated. They had a State with eight hundred miles of sea-coast and an average of two hundred and fifty miles in breadth, including both sides of the Sierra Nevada . . ." Taylor, El Dorado, or Adventures in the Path of Empire, *supra,* p. 154. These boundaries were set forth in clear and objective terms, and all subsequent efforts from the emerging territory and State of Nevada to persuade California to cede her additional territory was rejected.

The lines recommended by the Special Master were made in response to deep-seated dissatisfaction by the states and the federal government—as landowner of the affected area—with preexisting lines (to the extent that they existed). They were made by the Department of the Interior in discharge of its obligation to survey and dispose of the public lands. They have been observed ever since, and should be confirmed now.

However, if this Court concludes that logic should prevail over history, the only constitutionally permissible boundary is that described in California's 1849 Constitution. It can readily be established by a new survey. Such an alternative would be at once no costlier and

infinitely more logically consistent a solution than that of retracing the long-abandoned, and admittedly inaccurate efforts at locating it made over a hundred years ago.

Respectfully submitted,

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